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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/010,468	11/08/2001	Marvin Lewis JR.	18622.007	4368
21878	7590	05/28/2004	EXAMINER	
KENNEDY COVINGTON LOBDELL & HICKMAN, LLP			BOYD, JENNIFER A	
214 N. TRYON STREET			ART UNIT	PAPER NUMBER
HEARST TOWER, 47TH FLOOR				
CHARLOTTE, NC 28202			1771	

DATE MAILED: 05/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/010,468

Applicant(s)

LEWIS, MARVIN

Examiner

Jennifer A Boyd

Art Unit

1771

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --***Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) Responsive to communication(s) filed on 04 March 2004.  
2a) This action is FINAL.                    2b) This action is non-final.  
3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) Claim(s) 1-7 and 9-15 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) Claim(s) \_\_\_\_\_ is/are allowed.  
6) Claim(s) 1-7 and 9-15 is/are rejected.  
7) Claim(s) \_\_\_\_\_ is/are objected to.  
8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) The specification is objected to by the Examiner.  
10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) All    b) Some \* c) None of:  
    1. Certified copies of the priority documents have been received.  
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) Notice of References Cited (PTO-892)  
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
    Paper No(s)/Mail Date \_\_\_\_\_.

- 4) Interview Summary (PTO-413)  
    Paper No(s)/Mail Date. \_\_\_\_\_.  
5) Notice of Informal Patent Application (PTO-152)  
6) Other: \_\_\_\_\_.

## DETAILED ACTION

### *Response to Amendment*

1. The Applicant's Amendments and Accompanying Remarks, filed March 4, 2004, have been entered and have been carefully considered. Claim 1 is amended, claim 8 is cancelled, claims 9 – 15 are added and claims 1 – 7 and 9 – 15 are pending. In view of Applicant's amendment requiring that the base fabric layer and patterned fabric layer are "integrally-knitted together in a fabric structure which is substantially flat in cross-section", the Examiner withdraws all previously set forth rejections as set forth in the previous Office Action dated January 2, 2004. However, after an updated search, additional prior art has been found which renders the invention as currently claimed unpatentable for reasons herein below.
  
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### *Claim Rejections - 35 USC § 102*

3. Claims 1 – 6 and 9 – 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Vailati et al. (US 4,551,994).

Vailati teaches a waistband fabric (Title).

As to claims 1 and 9, Vailati teaches a narrow width fabric knitted on a crochet machine to produce a continuous length of integrally formed fabric (column 3, lines 10 – 14). Vailati teaches that the construction has one lengthwise extending portion 54 having a roll resistant construction and another lengthwise extending portion 56 having a plain stitch elastic

construction (column 5, lines 1 – 10). See Figures 3, 8 and 9. Vailati notes that the fabric does not curl on itself and tends to stay flat (column 2, lines 65 – 68). Vailati teaches that the roll resistant portion 54 is patterned (column 8, lines 25 – 35 and Figure 8). It should be noted that it has been held that the recitation that an element is “adapted to” perform a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138. Therefore, the limitation “adapted to closely conform to an edge bead of a mattress” is not given any patentable weight at this time. Additionally, it should be noted that the Examiner has given no patentable weight to “a mattress closing tape” as stated in claims 1 – 7 and “in combination with a mattress having an edge bead, a mattress closing tape covering and closely conforming to the edge bead of the mattress, the mattress closing tape” as stated in claims 9 – 14 are not given any patentable weight. Furthermore, it has been held that a recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior art article satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

As to claims 2 – 7 and 10 – 14, Vailati teaches the claimed structure as seen in Figure 9.

***Claim Rejections - 35 USC § 103***

4. Claims 7 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vailati et al. (US 4,551,994).

Vailati teaches that a pattern can be made with the filling yarns except fails to disclose that the pattern is a diamond pattern. It would have been obvious to one having ordinary skill in the art at the time the invention was made to create the knitted fabric with a diamond pattern

since it has been held to be within the general skill of a worker in the art to select a known pattern on the basis of its suitability for the intended use as a matter of design choice. *In re Leshin*, 125 USPQ 416. In the present invention, one would have been motivated to create the knitted fabric with a diamond shaped pattern to create an aesthetically pleasing material.

***Response to Arguments***

5. Applicant's arguments with respect to claims 1 – 7 and 9 – 15 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jennifer A Boyd whose telephone number is 571-272-1473. The examiner can normally be reached on Monday thru Friday (8:30am - 6:00pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Jennifer Boyd*  
Jennifer Boyd  
May 22, 2004

*Ula Ruddock*  
**Ula C. Ruddock**  
Primary Examiner  
Tech Center 1700